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Supreme Court, U.S.
FILED
AUG 27 2003
OFFICE OF THE CLERK

No. 02-1862

IN THE

Supreme Court of the United States

SHAREEF COUSIN,

Petitioner,

v.

BYRON BERRY AND ROGER JORDAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit apply the correct law, with respect to the doctrine of prosecutorial immunity, to the facts of the case before it, although the D.C. Circuit in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) may have had a narrower interpretation of the same law?

2. Is the Fifth Circuit's decision with respect to the advocacy role of a prosecutor consistent with *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993)?

3. Is a prosecutor functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he interviews a witness for the purpose of allegedly securing false testimony to be presented at the pending trial of an already identified suspect, rather than for the purpose of identifying a suspect or establishing probable cause?

4. Is a prosecutor functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when during an ongoing trial, and directly related to that trial process and for the purpose of securing a conviction, he allegedly detains witnesses, thus preventing them from testifying at the trial?

5. Is a prosecutor functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he allegedly fails to disclose exculpatory evidence?

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II. The Fifth Circuit's decision with respect to the advocacy role of a prosecutor is consistent with *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993). 3

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REASONS FOR DENYING THE PETITION

Respondents file this brief in opposition to point out numerous misstatements and material omissions in the Petition for Writ of Certiorari.

I. Although the D.C. Circuit in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) may have had a narrower interpretation of the law, the law that the Fifth Circuit applied to the facts of the case was correct, and accordingly, the Fifth Circuit has not entered a decision in conflict with the D.C. Circuit or the United States Supreme Court.

To support its Petition for Writ of Certiorari, Petitioner alleges that this Honorable Court should invoke its judicial discretion because the Fifth Circuit has entered a decision in conflict with the decisions of *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) and contrary to the decisions of this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and *Kalina v. Fletcher*, 522 U.S. 118 (1997). However, as shown herein, Respondents respectfully show that the Fifth Circuit applied the correct law in accordance with and consistent with the prior decisions of this Court.

Undoubtedly, the rule of law with respect to the doctrine of prosecutorial immunity is that prosecutors are absolutely immune from liability under 42 U.S.C. § 1983 for their conduct in initiating a prosecution and in presenting the State's case, insofar as that conduct is intimately associated with the judicial phase of the criminal process. *Burns v. Reed*, 500 U.S. 478, 86, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). This prosecutorial immunity applies

to any and all actions which occur in the course of the prosecutor's role as an advocate for the State. *Buckely v. Fitzsimmons*, 509 U.S. 259, 272, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). Accordingly, to determine whether a prosecutor is acting in his role as an advocate for the State, the test is whether or not the prosecutor's conduct is related to his prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Applying this test to the specific facts of this case, the Fifth Circuit recognized that its conclusion differs from the conclusion reached in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). *See* Pet. App. 10a. n.6. However, this is not the result of the Fifth Circuit misinterpreting the law or using incorrect law. The difference results from the fact that the D.C. Circuit has a narrower conception of the advocatory role, as recognized by the Fifth Circuit. *See* Pet. App. 10a. n.6.

Both Circuits agree on *how* to draw the line between the prosecutorial function and non-prosecutorial function, but they may disagree on *where* to draw the line. This does not result in the Fifth Circuit entering a decision in conflict with the D.C. Circuit, but rather this is the result of two separate courts reaching different results, by applying the same law to it's own set of unique facts. Accordingly, this Honorable Court should not grant the Petition for Writ of Certiorari.

II. The Fifth Circuit's decision with respect to the advocacy role of a prosecutor is consistent with *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993).

If there is a conflict in decisions, the conflict is with *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995) and the decisions of the U.S. Supreme Court. In other words, the Fifth Circuit's decision is consistent with *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) and *Buckely v. Fitzsimmons*, 509 U.S. 259, 274, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993).

As stated above, in determining whether a prosecutor is acting in his role as an advocate for the State, the test is whether or not the prosecutor's conduct is related to his prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). A significant factor used in evaluating the prosecutorial function of prosecutorial conduct is whether or not probable cause exists with respect to a particular suspect. *See Buckely v. Fitzsimmons*, 509 U.S. 259, 274, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). As stated in *Buckely*, "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the hand." *Id.* at 275, 113 S. Ct. 2602. Obviously, the former is a prosecutorial function, and the latter is an investigatory function. Additionally, *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) recognized that

"[p]reparation, both for the initiation of the criminal process and for a trial, may require the *obtaining*, reviewing, and evaluating of evidence." (emphasis added).

The Fifth Circuit specifically acknowledged that the determination of probable cause, alone, "does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *See* Pet. App. 10a, *quoting Buckely v. Fitzsimmons*, 509 U.S. at 274 n.5. However, consistent with *Imbler v. Pachtman*, *supra*, and *Buckely v. Fitzsimmons*, *supra*, the Fifth Circuit correctly held that the existence of probable cause with respect to a particular subject is relevant factor to be used in evaluating the advocacy nature of prosecutorial conduct. *See* Pet. App. 10a.

In evaluating whether a prosecutor's conduct is related to a prosecutorial function, as compared to an investigatory function, it is not error for a Court to consider whether or not probable cause exists with respect to a particular suspect. If a prosecutor interviews a witness for the purpose of identifying a suspect or establishing probable cause, then the prosecutor's conduct is more likely to be an investigatory function. However, if a prosecutor interviews a witness for the purpose of securing evidence that will be used at the trial of an already identified suspect, then the prosecutor's conduct is more likely to be an prosecutorial function. *See Hill v. City of New York*, 45 F.3d 653, 662-63 (2nd Cir. 1995) (holding that the existence of probable cause determines whether fabrication of evidence is investigatory or advocatory); *See also Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001) (holding that fabrication of evidence was not protected by absolute immunity because there was no probable cause).

Accordingly, the Fifth Circuit's decision is consistent with *Imbler v. Pachtman*, *supra*, and *Buckely v. Fitzsimmons*, *supra*, and the Petition for Writ of Certiorari should be denied.

III. The Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he interviews a witness for the purpose of allegedly securing false testimony to be presented at the pending trial of an already identified suspect, rather than for the purpose of identifying a suspect or establishing probable cause.

It is well-settled that a State's prosecuting attorney, acting within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State's case, is absolutely immune in his individual capacity from a civil suit for damages under 42 U.S.C. § 1983 for alleged deprivations of the accused's constitutional rights. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976). In so deciding, the U.S. Supreme Court reasoned that the role of the prosecutor is so integral to the judicial process as to deserve this level of protection in order to insure prosecutorial independence of judgment. The absolute immunity recognized in *Imbler* has been applied to claims involving allegations of fabrication of evidence and coercion of perjured testimony. *See Lee v. Willins*, 617 F.2d 320 (2nd Cir. 1980); *See also Kerr v. Lyford*, 171 F.3d 330 (5th Cir. 1999) (allegations of securing an indictment on the basis of and presenting false, coerced and fabricated evidence); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) (allegations of withholding *Brady* material and presenting false testimony); *Hill v. City of New York*, 45 F.3d 653

(2nd Cir. 1995) (allegations of malicious prosecution, presenting false testimony to and withholding exculpatory information from the Grand Jury, and deliberately suppressing *Brady* material).

As stated by the Second Circuit, "[p]rosecutorial immunity from § 1983 liability is broadly defined, covering virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." *Hill v. New York*, *supra*, *citing Dory v. Ryan*, 25 F.3d 81, 83 (2nd Cir. 1994).

Petitioner complains that Respondents interviewed witnesses whose names did not appear on the police reports, specifically James Rowell. Petitioner alleges that in these interviews, Jordan suborned perjury by these witnesses, encouraging and/or coercing them to lie on behalf of the State and against the Petitioner, Shareef Cousin, at his criminal trial. While Respondents have strenuously and genuinely disputed the facts underlying these allegations, it is respectfully suggested that this dispute is not material to a determination of whether or not the doctrine of absolute immunity applies to the Petitioner's § 1983 suit. In any event, Petitioner has attempted to criticize and distinguish the Fifth Circuit's decision, by characterizing Respondent's actions of securing testimony for trial against an identified suspect as being "investigatory." However, as discussed above and herein, the Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he allegedly interviews a witness, even for the purpose of allegedly securing false testimony, to be presented at the pending trial of an already identified suspect, rather than for

the purpose of identifying a suspect or establishing probable cause. As aptly put by a district court in South Carolina:

> . . . the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the *obtaining*, reviewing, and evaluating of evidence . . .

Cribb v. Pelham, 552 F. Supp. 1217, 1222 (D. S. Car. 1982) (emphasis added).

Prosecutors are quite routinely offered testimony by incarcerated individuals, or by those threatened with incarceration, in return for some kind of favorable treatment in connection with their own legal difficulties. Prosecutors should be able to interview these potential witnesses and deal with them without fear of subsequent civil suit in the event their testimony is adverse to the criminal defendant. Such fear poses a threat of disruption in the orderly administration of justice and the vigorous prosecution of criminal offenses which originally caused the Supreme Court to apply the common law concept of absolute immunity to § 1983 cases in *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Clearly, if a prosecutor is attempting to secure evidence, even fabricated evidence, to be used at trial, against an already identified suspect, then this conduct is a prosecutorial function, as compared to an investigatory function. *See Buckely v. Fitzsimmons*, 509 U.S. 259, 274, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Hill v. City of New York*, 45 F.3d 653, 662-63 (2nd Cir. 1995); *Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001). In such a instance, the prosecutor is functioning as an advocate preparing for trial, rather than functioning as a detective investigating a crime.

IV. The Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when during an ongoing trial, and directly related to that trial process and for the purpose of securing a conviction, he allegedly detains witnesses, thus preventing them from testifying at the trial.

Plaintiff alleges that the Respondents "detained" certain of Petitioner's alibi witnesses, requiring them to remain in the District Attorney's office [which is immediately adjacent to the courthouse in which the trial was ongoing] during Plaintiff's murder trial, and thereby preventing them from giving testimony. Since clearly Plaintiff has no right or standing to assert the claim which would inure to these witnesses that their constitutional rights to liberty were violated, Plaintiff-appellant apparently argues that the actions of the prosecutors denied to him his constitutional right to call these persons as witnesses at his murder trial. While Defendant-appellees vigorously dispute the factual basis of these claims, it is also respectfully suggested that this dispute

is immaterial in determining whether or not the doctrine of absolute immunity applies to the Petitioner's § 1983 suit.

Again, Petitioner has attempted to criticize and distinguish the Fifth Circuit's decision, by characterizing Respondent's conduct with regard to allegedly detaining the witnesses as not being a prosecutorial function. However, it is hard to imagine conduct more integral to the prosecutor's role of advocate than the marshaling of witnesses during the actual trial. Regardless of what actually took place[1], and regardless of whether or not any action taken by Respondents in this context violated Petitioner's constitutional and/or civil rights, the Respondents are afforded the protection of absolute immunity.

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1. Although Petitioner complains that certain "alibi" witnesses were hidden from him in the DA's office during the trial, Petitioner's trial counsel testified in his deposition, taken in the course of the proceedings below, that Petitioner's criminal defense counsel never asked that these witnesses be called, nor did the defense ask that an attachment or bench warrant issue to secure their appearance. *See* "Supplemental Memorandum in Support of Motion of Defendants Connick, Berry and Jordan for Dismissal, or, Alternatively, for Summary Judgment", Exhibit 11, Deposition of Roland Belsome, at pp. 28-32. Fifth Circuit Record, Vol. IV, p.1015-1016. Rather, counsel assumed —

> "I do remember the witnesses being gone, and my impression was 'Well, the witness was under subpoena and we talked to them and they said one thing in the hallway and then they get ready to get on the stand and they vanish, maybe they're not going to say what we think they were going to say in the hallway.'"

Clearly, any failure to secure the testimony of certain of the alibi witnesses was the fault of Petitioner's defense counsel and not that of Respondents.

Just as "probable cause" is a relevant factor in determining whether a prosecutor's conduct is related to a prosecutorial function, as contrasted to an investigatory function, so is the "timing of the event" a relevant factor. The Fifth Circuit correctly held that prosecutors should not enjoy immunity just by the mere fact that the conduct occurs during the trial, but rather, the timing of events, while not determinative, can be relevant to the inquiry into determining the prosecutorial function. *Citing Buckely v. Fitzsimmons*, 509 U.S. at 274 (considering the stage of the criminal justice process in determining the functional characterization of the conduct); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994) (considering the pendency of judicial proceedings in making an immunity determination).

In fact, this Court held that pendency of judicial proceedings is logically related to the determination whether a prosecutor's activities are intimately associated with the judicial phase of the criminal process, and thus are functions to which the reasons for absolute immunity apply. *Imbler v. Pachtman*, 424 U.S. at 430.

Accordingly, during an ongoing trial, prosecutors who allegedly detain witnesses or otherwise have witnesses removed from the courthouse, in order to secure a conviction, are acting as advocates and are entitled to absolute immunity. *See House v. Belford*, 956 F.2d 711, 721-22 (7th Cir. 1992) (finding that a prosecutor was entitled to absolute immunity for allegedly instructing a deputy to bar the courtroom to the defendant's family and potential witnesses).

V. The Fifth Circuit's decision is correct because a prosecutor is functioning as an advocate for the State, thereby entitling the prosecutor to absolute immunity, when he allegedly fails to disclose exculpatory evidence.

The U.S. Supreme Court first recognized the application of the doctrine of absolute immunity of prosecutors to suits brought pursuant to 42 U.S.C. § 1983 in *Imbler v. Pachtman*, *supra*, and specifically applied that doctrine to bar claims brought therein against a prosecutor which included allegations of the suppression of material evidence. In *Reid v. New Hampshire*, 56 F.3d 332 (1st Cir. 1995), absolute immunity was found to protect state prosecutors from suit based on allegations of willful, deliberate withholding of material in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and even in direct violation of trial court orders and even when it was alleged that the prosecutors repeatedly misled the trial court itself throughout the criminal proceedings. "[A] prosecutor cannot be held personally liable for the knowing suppression of exculpatory information." *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1372-73 (10th Cir. 1991).

Petitioner avers that the Court should revisit and adopt an exception to the doctrine of prosecutorial immunity based upon egregious violations of a prosecutor's duty provide the Defendant with exculpatory evidence. However, this Court has held that absolute immunity extends to the deliberate suppression of exculpatory evidence. *Imbler v. Pachtman*, 424 U.S. at 430 n.34.

As noted by the Fifth Circuit, wilful or malicious prosecutorial misconduct is egregious by definition. *See* Pet. App. 15a, *citing Imbler*, 424 U.S. at 430. As stated in the Fifth Circuit's decision,

> Absent immunity, the specter of litigation could undermine prosecutors' ability to exercise their independent judgment with respect to the initiation and conduct of criminal proceedings. In essence, the existence of the doctrine of absolute prosecutorial immunity represents a determination that the need for "vigorous and fearless performance of the prosecutor's duty," justifies its regrettable but necessary cost, namely, that it may sometimes bar the courthouse door to potentially meritorious claims.

See Pet. App. 15a.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urges the Court to deny certiorari.

Respectfully submitted,

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